



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

July 23, 2003

Mr. James M. Frazier III
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342

OR2003-5090

Dear Mr. Frazier:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 184694.

The Texas Department of Criminal Justice (the "department") received a request for records pertaining to the requestor's client. You claim that the requested information is excepted from disclosure under sections 552.101, 552.117, and 552.134 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first note that the information at issue contains medical records, access to which is governed by the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). We also have concluded that when a file is created as the result of a hospital stay, all of the documents in the file that relate to diagnosis and treatment constitute either physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. *See* Open Records Decision No. 546 (1990). The medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked the medical records subject to the MPA. Absent the applicability of an MPA access provision, the department must withhold this information pursuant to the MPA.

Portions of the information at issue constitute mental health records that are subject to chapter 611 of the Health and Safety Code. Chapter 611 provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) provides:

Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Health & Safety Code § 611.002. Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See* Health and Safety Code § 611.001. Sections 611.004 and 611.0045 provide for access to mental health records only for certain individuals. *See* Open Records Decision No. 565 (1990). We have marked the submitted information which constitutes mental health records that are subject to chapter 611. The department may only disclose this information as provided by the access provisions of sections 611.004 and 611.0045. Absent the applicability of a mental health record access provision, the department must withhold this information pursuant to chapter 611 of the Health and Safety Code.

We also note that portions of the information at issue constitute dental records that are subject to chapter 258 of the Occupations Code. Section 258.102 provides:

(a) The following information is privileged and may not be disclosed except as provided by this article:

- (1) a communication between a dentist and a patient that relates to a professional service provided by the dentist; and
- (2) a dental record.

(b) The privilege described by this section applies regardless of when the patient received the professional service from the dentist.

Occ. Code § 258.102. A "dental record" means dental information about a patient that is created or maintained by a dentist and relates to the history or treatment of the patient. *See* Occ. Code § 258.101. We have marked documents created or maintained by a dentist which relate to the history or treatment of the patient. Absent the applicability of a dental record access provision, the department must withhold this information pursuant to chapter 258 of the Occupations Code.

You claim that the information labeled "State Bar Communication" pertains to a grievance filed against an attorney by a department employee acting on behalf of the department and is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with rules 2.15 and 15.10 of the Texas Rules of Disciplinary Procedure.¹ We note that the rules of the bar have the same effect as statutes. *See Board of Law Examiners v. Stevens*, 868 S.W.2d 773 (Tex. 1994); *see also State Bar v. Wolfe*, 801 S.W.2d 202, 203 (Tex. App.—Houston [1st Dist.] 1990, no writ); *State Bar v. Edwards*, 646 S.W.2d 543, 544 (Tex.App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.). Section 81.033(a) of the Government Code provides:

All records of the state bar, except for records pertaining to grievances that are confidential under the Texas Rules of Disciplinary Procedure, and records pertaining to the Texas Board of Legal Specialization, are subject to Chapter 552.

Gov't Code § 81.033(a). Rule 15.10 provides:

All communications, written and oral, and all other materials and statements to or from the Commission, Chief Disciplinary Counsel, the Complainant, the Respondent, and others directly involved in the filing, screening,

¹ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 encompasses information protected by other statutes.

investigation, and disposition of Inquiries and Complaints are absolutely privileged.

Tex. R. Disciplinary P. 15.10, *reprinted in* Gov't Code Ann., tit. 2, subtit. G app. A-1. However, rule 2.15 of the Texas Rules of Disciplinary Procedure provides:

All information, proceedings, hearing transcripts, statements, and any other information coming to the attention of the investigatory panel of the Committee must remain confidential and may not be disclosed to any person or entity (except the Chief Disciplinary Counsel) unless disclosure is ordered by the court. If there is a finding of Just Cause and any Sanction other than a private reprimand (which may include restitution and payment of Attorneys' Fees) imposed by agreement of the Respondent, all of the information, proceedings, hearing transcripts, documents, statements, and other information coming to the attention of the investigatory panel shall be, upon proper request, made public. Notwithstanding anything herein to the contrary, any action taken by a Committee to refer a matter to the Board of Disciplinary Appeals for attorney Disability screening and determination must remain confidential.

Tex. R. Disciplinary P. 2.15. You do not inform us that there has been a finding of just cause or any sanction related to this matter. We therefore assume no such disposition has occurred. Based on that assumption, your representations, and our review of the information at issue, we agree that the information labeled "State Bar Communication" is confidential under rule 15.10 and must be withheld from disclosure under section 552.101.²

You assert that some of the requested information is about a "releasee" or "a person directly identified in any proposed plan of release for an inmate" and therefore is confidential under section 508.313 of the Government Code. In pertinent part, section 508.313 provides:

(a) All information obtained and maintained, including a victim protest letter or other correspondence, a victim impact statement, a list of inmates eligible for release on parole, and an arrest record of an inmate, is confidential and privileged if the information relates to:

(1) an inmate of the institutional division subject to release on parole, release to mandatory supervision, or executive clemency;

(2) a releasee; or

²We note that the phrase "absolutely privileged" in rule 15.10 is synonymous with "confidential" in section 81.033. *See, e.g.,* Attorney General Opinion JM-1235 (1990); *see also* Open Records Decision Nos. 384 (1983), 375 (1983).

(3) a person directly identified in any proposed plan of release for an inmate.

(b) Statistical and general information relating to the parole and mandatory supervision system, including the names of releasees and data recorded relating to parole and mandatory supervision services, is not confidential or privileged and must be made available for public inspection at any reasonable time.

(c) The department, on request or in the normal course of official business, shall provide information that is confidential and privileged under Subsection (a) to:

(1) the governor;

(2) a member of the [Board of Pardons and Paroles];

(3) the Criminal Justice Policy Council in performing duties of the council under Section 413.017 [of the Government Code]; or

(4) an eligible entity requesting information for a law enforcement, prosecutorial, correctional, clemency, or treatment purpose.

(d) In this section, "eligible entity" means:

(1) a government agency, including the office of a prosecuting attorney;

(2) an organization with which the department contracts or an organization to which the department provides a grant; or

(3) an organization to which inmates are referred for services by the department.

(e) This section does not apply to information relating to a sex offender that is authorized for release under Chapter 62, Code of Criminal Procedure.

(f) This section does not apply to information that is subject to required public disclosure under Section 552.029 [of the Government Code].

Act of May 21, 1997, 75th Leg., R.S., ch. 165, § 12.01, 1997 Tex. Gen. Laws 436, *amended* by Act of April 1, 2003, 78th Leg. R.S., ch. 6, § 3, 2003 Vernon's Sess. Law Serv. 6, 7-8. A releasee is a person released on parole or to mandatory supervision. Gov't Code

§ 508.001(9). You state that most of the information at issue is held by the Parole Division of the department and concerns releasees or inmates of the department subject to release. After reviewing your arguments and the submitted information, we find that the information that we have marked is made confidential by section 508.313. The requestor does not appear to be an entity authorized to obtain this information under section 508.313(c). In addition, the marked information is not made public under section 552.029 of the Government Code,³ *see* Gov't Code § 508.313(f), or under chapter 62 of the Code of Criminal Procedure,⁴ *see* Gov't Code § 508.313(e). We have marked the information that is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 508.313.

You claim that the remaining submitted information is excepted from disclosure pursuant to section 552.134 of the Government Code. Section 552.134(a) states in pertinent part:

(a) Except as provided by Subsection (b) or by Section 552.029, information obtained or maintained by the Texas Department of Criminal Justice is excepted from the requirements of Section 552.021 if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Gov't Code, § 552.134(a). You assert that the remaining submitted information concerns an inmate who was confined in a facility operated by the department. However, we note that section 552.134(a) is explicitly made subject to section 552.029 of the Government Code. Basic information regarding the death of an inmate in custody, an incident involving the use of force, or an alleged crime involving an inmate must be released in accordance with section 552.029(8) of the Government Code. *See* Gov't Code §§ 552.134(a), 552.029(8). This office has determined that basic information under section 552.029(8) includes the time and place of an incident, names of inmates and department officials directly involved in an incident, a brief narrative of the incident, a brief description of any injuries sustained, and information regarding any criminal charges or disciplinary actions filed as a result of the incident. We note that portions of the remaining submitted information pertain to an incident involving the use of force. Accordingly, while the department must generally withhold the information that we have marked under section 552.134, pursuant to section 552.029(8), you must release any basic information regarding this incident.

³ Section 552.029 provides that, notwithstanding sections 508.313 or 552.134, certain information about an inmate who is confined in a facility operated by or under a contract with the Texas Department of Criminal Justice is subject to required disclosure under the Public Information Act.

⁴ Chapter 62 of the Code of Criminal Procedure relates to the registration of sex offenders and provides at article 62.08 that *registration information* is to be maintained by the Department of Public Safety in a central database which, with certain exceptions, is public information.

In summary, absent the applicability of an MPA access provision, the department must withhold some information that we have marked pursuant to the MPA. Absent the applicability of a mental health record access provision, the department must withhold some information that we have marked pursuant to chapter 611 of the Health and Safety Code. Absent the applicability of a dental record access provision, the department must withhold some information that we have marked pursuant to chapter 258 of the Occupations Code. The information that you have labeled "State Bar Communication" is confidential under rule 15.10 and must be withheld under section 552.101. We have marked the information that is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 508.313 of the Government Code. Except for basic information regarding the use of force incident, the department must withhold the information we have marked pursuant to section 552.134 of the Government Code.⁵

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877)673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

⁵As our ruling is dispositive, we do not address your remaining claims.

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512)475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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Assistant Attorney General
Open Records Division

CN/seg

Ref: ID# 184694

Enc. Submitted documents

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(w/o enclosures)